

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LILA H. KOHLER)	
Claimant)	
VS.)	
)	
BEST CLEANERS)	Docket No. 1,033,381
Respondent)	
AND)	
)	
COMMERCE & INDUSTRY INSURANCE)	
COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the August 28, 2007 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits in the form of temporary total disability beginning November 13, 2006, and continuing until claimant was returned to work the first week of February 2007, and authorized medical treatment for the expenses incurred from November 13, 2006, and as itemized in Claimant's Exhibit 1.¹ The ALJ determined that claimant had proven that she suffered personal injury by accident arising out of and in the course of her employment with respondent.

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Samantha N. Benjamin-House of Kansas City, Kansas.

The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Discovery Deposition of Lila Kohler taken on April 20, 2007; the transcript of Preliminary Hearing held April 26, 2007, with attached exhibits; and the documents filed of record in this matter.

¹ P.H. Trans., Cl. Ex. A.

ISSUE

Did claimant suffer accidental injury arising out of and in the course of her employment with respondent? Respondent argues claimant “just fell” in the alley behind respondent’s store on November 13, 2006, while “walking”. In the alternative, respondent argues that claimant suffered a spontaneous hip fracture which caused her to fall. Claimant argues there is no medical evidence in this record to support the “spontaneous hip fracture” argument, and that claimant actually tripped as she was exiting the building, therefore, making the injury compensable.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was working for respondent on November 13, 2006, when, while checking the trash dumpster outside respondent’s back door, claimant fell, breaking her hip. While waiting for the ambulance, claimant was questioned by Lonna Flores, from respondent’s regional office. Claimant told Ms. Flores that she “just fell”. Claimant and Ms. Flores had several conversations later, with claimant continuing to say she just fell. Claimant also had a conversation with Shawn Dixon, respondent’s regional manager, about the fall and also told her she “just fell”.

Claimant was initially treated by William H. Scott, M.D., of the Via Christi Regional Medical Center, on the date of accident. Claimant advised the doctor that she fell without any reason. Claimant could not remember tripping on anything.

Claimant underwent open reduction and internal fixation of her left hip on November 15, 2006, and later came under the care of the Wesley Rehabilitation Hospital. In its Discharge Summary of November 30, 2006, it was noted that claimant had a “History of 2 falls in the past year.”² No additional explanation is contained in this record.

At her discovery deposition taken on April 20, 2007, claimant mentioned that she may have tripped over a wrinkle in a rug, which led to or caused the fall. This is the first time claimant provided a reason for the fall. Claimant was examined at the request of her attorney by pain management specialist George G. Fluter, M.D., on March 29, 2007. Claimant advised Dr. Fluter that she fell out of the back door of the facility while taking out the trash. Claimant advised Dr. Fluter that she was not sure how it happened.

² P.H. Trans., Resp. Ex. 2.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁶

There is no dispute that claimant's accident occurred while she was in the course of her employment. Claimant was clearly working for respondent at the time of the fall. There is a significant dispute as to whether the accident occurred out of claimant's employment with respondent or whether it was the result of the normal activities of day-to-day living, or whether it was the result of an idiopathic fall and, thus, not compensable.

³ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2006 Supp. 44-501(a).

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

To arise “out of” employment requires some causal connection between the accidental injury and the employment.⁷ Whether an injury arises out of the worker’s employment depends on the facts peculiar to the particular case.⁸

It has been held in Kansas where the effects of a fall are the result of a personal condition, but the conditions of employment place the employee in a position increasing the effects of an injury, the injury becomes compensable.⁹ However, where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted.¹⁰

An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.¹¹

If, as testified to by claimant, she was injured while carrying trash or after she tripped on a rug while going out respondent’s back door, the accident is compensable. However, claimant’s explanations of the fall are called into question by respondent, based on claimant’s earlier comments to Ms. Flores and Ms. Dixon and her comments to the doctors who evaluated and treated claimant after this fall. In *Hensley*,¹² the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson’s Worker’s Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

⁷ *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁸ *Id.* at 502.

⁹ *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev denied* 250 Kan. 804 (1992), citing 1 *Larson’s Workers’ Compensation Law* § 12.11 (1990).

¹⁰ *Id.* at 460, citing *Southland Corp. v. Parson*, 1 Va. App. 281, 338 S. E. 2d 162 (1985).

¹¹ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 2, 147 P. 3d 1091, *rev. denied* 281 Kan. ____ (2006).

¹² *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

Respondent argues that claimant suffered from an undiagnosed condition which caused her to fall. The notation in the Wesley Rehabilitation Hospital Discharge Summary describes two falls suffered by claimant within the last year. The medical report provides no explanation for when, how or why claimant fell. It is clear in Kansas that a fall suffered as the result of a personal condition would not be compensable.¹³ However, the evidence propounded by respondent does not rise to the level of proof of a personal condition. It still leaves unanswered the question of why claimant fell. With the information contained in this record, the fall remains “unexplained” and, therefore, compensable.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant's accident arose out of and in the course of her employment with respondent and the Order of the ALJ, granting benefits, should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 28, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier

¹³ *Bennett, supra.*

¹⁴ K.S.A. 44-534a.

Nelsonna Potts Barnes, Administrative Law Judge